UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIGADIER CONSTRUCTION SERVICES, LLC ,	)	
Plaintiff,	)	
v.	)	
	)	Civ. Action No. 11-0497 (RBW)
HON. ERIK K. SHINSEKI, SECRETARY OF THE UNITED STATES DEPARTMENT OF VETERAN AFFAIRS, IN HIS OFFICIAL CAPACITY,	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE MOTION TO TRANSFER

Defendant hereby opposes plaintiff's Motion For Injunction and Temporary Restraining Order, in which he seeks an Order to restrain defendant for the purpose of being awarded a contract within a service disabled veteran construction set-aside program. Plaintiff contends that it is eligible to participate in the service disabled veteran construction set-aside program and was precluded from participation unlawfully.

The Plaintiff has failed to demonstrate that the circumstances as outlined merit injunctive relief. Alternatively, this matter should be transferred to the Court of Federal Claims as the relief it requests is under the exclusive jurisdiction of that court.

I. Background

A. The VIP database and SDVOSB contracts

The Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub.L.No. 109–461, §§ 502–03 (codified at 38 U.S.C.§§ 8127–28 (2006)), was enacted to increase contracting opportunities for service-disabled veteran and veteran-owned qualified small businesses. *See* 38 U.S.C. § 8127(a). Accordingly, the Department of Veteran Affairs (DVA) sets aside certain contracts for Service Disabled Veteran Owned Small Business (SDVOSB) concerns. *See Id*. §§ 8127–28. The DVA keeps an online database of qualified SDVOSBs at its VIP website, www.VetBiz.gov. *See Id*. § 8127(f) ("[T]he Secretary shall maintain a database of small business concerns owned and controlled by veterans and the veteran owners of such business concerns."); 48 C.F.R.2§ 804.1102 (2010) (providing VIP online database). Until January 1, 2012, in order to be awarded a contract, an otherwise qualified SDVOSB must be listed in the VIP database. *See Id*. § 8127(e) ("A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary under subsection (f)."); 48 C.F.R. § 804.1102 ("Prior to January 1, 2012, all VOSBs and SDVOSBs must be listed in the VIP database, available at http://www.VetBiz.gov, and also must be registered in the Central Contractor Registration (CCR) (*See* 48 CAR subpart 4.11) to receive contract awards under DVA's Veteran-owned

Small Business prime contracting and subcontracting opportunities program."). Also until December 31, 2011, an applicant can self-represent its status as an SDVOSB in the VIP database. *See* 48 C.F.R. § 819.7003(b) (2010) ("At the time of submission of offer, the offeror must represent to the contracting officer that it is a—(1) SDVOSB concern or VOSB concern; …. and (3) Verified for eligibility in the VIP database.").

After December 31, 2011, the regulations require that an applicant be "listed as verified" in the VIP database. 48 C.F.R. § 804.1102 ("After December 31, 2011, all VOSBs, including SDVOSBs, must be listed as verified in the VIP database, and also must be registered in the CCR to be eligible to participate in order to receive new contract awards under this program."). The Center for Veterans Enterprise (the "CVE"), a division of the DVA, evaluates applications for inclusion in the VIP database to verify whether an applicant satisfies the eligibility requirements to be listed as a SDVOSB. *See* 38 C.F.R. § 74.11(a) (2010) ("The Director, Center for Veterans Enterprise, is authorized to approve or deny applications for Vet-Biz VIP Verification. The CVE will receive, review and evaluate all VetBiz VIP Verification applications."). The CVE has authority to remove from the VIP database a firm "found to be ineligible due to an SBA protest decision or other negative finding," and the firm will not be eligible to participate in the 38 U.S.C. § 8127 program. 38 C.F.R. § 74.2(e) (2010). "Once an application, a request for reconsideration, or an appeal to a cancellation notice, as applicable, has been denied, the applicant or participant shall be

required to wait for a period of 6 months before a new application will be processed by CVE." 38 C.F.R. § 74.14 (2010)

Section 104 of Public Law 111-275, enacted October 13, 2010, amended 38 USC § 8127 as follows:

> "(B) by striking paragraph (4) and inserting the following new paragraph (4):
>
> "(4) No small business concern may be listed in the database until the Secretary has verified that--
> "(A) the small business concern is owned and controlled by veterans; and
>
> "(B) in the case of a small business concern for which the person who owns and controls the concern indicates that the person is a veteran with a service-connected disability, that the person is a veteran with a service-connected disability."

In addition, the statute provided, with respect to firms listed on VIP but not yet verified by DVA that:

> "[N]ot later than 60 days after the date of the enactment of this Act, the Secretary shall notify the person who owns and controls the concern that--
>
> (A) the Secretary is required to verify the status of the concern in accordance with such paragraph, as so amended;
>
> (B) verification of such status shall require that the person who owns and controls the concern apply for inclusion in the database in accordance with such subsection, as so amended;
>
> (C) application for inclusion in the database shall constitute permission under section 552a of title 5, United States Code (commonly referred to as the Privacy Act), for the Secretary to access such personal information maintained by the Secretary as may be necessary to verify the information contained in the application; and

> (D) the person who owns and controls the concern must submit to the Secretary all information required by the Secretary under this paragraph within 90 days of receiving the Secretary's notice of such requirement or the concern shall be removed from the database.

B. Pre-solicitation

In 2010 plaintiff submitted to the CVE its application for inclusion in the VIP database. Pl.'s Compl. at ¶18. On December 2010, plaintiff was notified that BCS needed to also apply for the Veteran-Owned Small Business (VOSB) Verification Program. *Id.* BCS, who identified Ms. Shawnte' Thompson as the Service- Disabled Veteran (SDV), timely submitted an online Verification Program application. *Id.* at ¶ 23. On January 24, 2011, CVE notified plaintiff that it had been identified as a "potential awardee" on a pending DVA contract. *Id.* at ¶ 20. On January 28, 2011 CVE notified BCS that on-site examination, inter alia, may be needed to complete the application process. *Id.* at ¶ 24. In February 2011, a CVE contract examiner conducted an on-site visit at the BCS location in Cleveland, Ohio with Ms. Thompson. *Id* at ¶ 25. The CVE contract examiner and Ms. Thompson exchanged official BCS information and documents elicited to establish "ownership" and "control" of BCS by SDV, Shawnte' Thompson. *Id.* at ¶¶ 26-34. On March 2, 2011, CVE notified plaintiff that BCS would be denied entry into the VetBiz VIP Verification Program database due to the lack of sufficient "control" by the SDV, Shawnte' Thompson in the business operations of BCS. *Id.* at ¶ 35.

On March 8, 2011 the plaintiff filed the instant complaint and motion for preliminary injunction and for temporary restraining order.

II. SUMMARY OF ARGUMENT

As a prerequisite to be included in the DVA VetBiz Vendor Information Verification Program (VIP) and the Veterans First Contracting Program, a participating business must be, inter alia, "owned" and "controlled" by a service disabled United States veteran. On March 2, 2011, the DVA notified plaintiff, Brigadier Construction Services ("BCS"), that it had been denied for inclusion in the(VIP) Verification Program and the Veterans First Contracting Program because the company did not have a SDV owned business (SDVOSB) in "control" BCS in accordance with the requirements of DVA regulations. Plaintiff's Motion at 1. (Pl's. Mot). Specifically, On March 2, 2011 the DVA documented, *inter alia*: 1) that the CEO, President and putative 'SDV', Ms. Thompson delegated many duties to non-veteran "subordinate officers"; 2) that non-veteran "subordinate" officers earned a larger salary from BCS than she did; 3) that at least one of the "subordinate" officers had a stake in the ownership of another non-veteran owned construction company named "McTech" 4) that BCS leased all of its office space from McTech Corporation 5) that BCS and McTech "shared" the majority (36) of BCS's employees; 6) that it took an agreement of a super majority of members of the LLC before Ms.

Thompson could obligate BCS to a contract over $10,000; 7) that Ms.Thompson did not present facts to evidence the managerial expertise or experience to manage a construction company the size of BCS. DVA Final Decision Letter (Final Decision)(plaintiff's exhibit A of Thompson Declaration).

As a result of these findings, DVA found that BCS was controlled by a SDV in accordance with the requirements of the applicable regulations. Shortly thereafter, plaintiff initiated this action, alleging that the DVA final decision is not supported by the evidence in the administrative record and is therefore arbitrary ,capricious, an abuse of discretion, and otherwise not in accordance with the law. Plaintiff's Complaint (Pl's. Compl.) ¶ 3.

Plaintiff seeks an declaratory judgment from this Court stating that the DVA final decision is contrary to law, arbitrary and capricious, unenforceable and otherwise unlawful and that Ms. Thompson is the sole owner and managing member of BCS. Plaintiff also seeks preliminary injunctive relief enjoining the defendant Secretary of the United States of Veteran Affairs from awarding a "Pending Contract" that plaintiff maintains it would have been awarded but for the DVA's final decision. Plaintiff also seeks preliminary injunctive relief enjoining the defendant Secretary of the United States of Veteran Affairs from enforcing or implementing the DVA's final decision (with costs and attorney's fees against the defendant). Finally, plaintiff also asks that this Court vacate the DVA's final decision or in alternative remand the

DVA's final decision to the agency for further proceedings. Pl's. Compl., Prayer for Relief.

"One cannot circumvent exclusive jurisdiction in the Claims Court by suing simply for declaratory or injunctive relief in a case where such relief would be the equivalent of a judgment for money damages." *Consolidated Edison Co. of New York v. United States Dep't of Energy*, 247 F.3d 1378, 1385 (Fed. Cir.), cert. denied, 534 U.S. 1054 (2001) (*quoting A.E. Finley Assoc., Inc. v. United State*s, 898 F.2d 1165, 1167 (6th Cir. 1990). Yet that is precisely what Cartwright and Foremost seek to do, by couching their challenge to GSA's collection of debts attributable to overcharges in terms of an Administrative Procedure Act claim. Those claims fall within the scope of the Tucker Act, and therefore jurisdiction lies exclusively in the Court of Claims. Because that alternative relief is available, the APA does not provide a cause of action. Plaintiff's claims should therefore be dismissed for lack of jurisdiction.

In the event that the Court determines it has jurisdiction over this matter, plaintiff's preliminary injunction motion should be denied. Plaintiff simply have not established that they are entitled to that extraordinary remedy. Plaintiff do not seek to preserve the status quo, but instead want to alter it by vacating the DVA's Final Decision and essentially forcing the DVA to allow it entry into the Veteran's First Contracting program. Courts cannot grant requests for such sweeping mandatory injunctive relief absent a strong

showing that all four elements of the preliminary injunction standard have been met, namely that: (1) plaintiff will suffer irreparable harm absent an injunction; (2) plaintiff have a substantial likelihood of success on the merits; (3) the injunction will not harm third parties; and (4) granting the injunction would be in the public interest. Plaintiff fail all four elements of that test. They will not be irreparably harmed. They cannot establish that the Court has jurisdiction, let alone that they will prevail on the merits of their claims. The relief plaintiff seeks will undermine the public interest in ensuring that the Government is not allowing non-veteran owned and controlled small businesses to reap the benefits of a program Congress has specifically set aside for service-disabled veterans. For all those reasons, plaintiff's preliminary injunction motion should be denied.

III. STANDARD OF REVIEW

The decision whether to grant preliminary injunctive relief under Federal Rule of Civil Procedure 65(a) is reserved to the sound discretion of the Court. The exercise of this discretion is subject to the admonition of the Supreme Court that an injunction should issue only when the intervention of a court of equity "'is essential in order effectually to protect property rights against injuries otherwise irremediable.'" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (*quoting Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)). A

preliminary injunction is "an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004); *See also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (noting that a preliminary injunction is an "extraordinary and drastic remedy"). The burden is particularly difficult to meet in the procurement context, which is analogous to the present case, where courts have consistently held that agency discretion must be given particular force. *See, e.g., Sea-Land Serv., Inc. v. Brown*, 600 F.2d 429, 434 (3d Cir. 1979); *M. Steinthal & Co. v. Seamens*, 455 F.2d 1289, 1301, 1304 (D.C. Cir. 1971).

To warrant preliminary injunctive relief, a moving party must show: "(1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction were not granted; (3) that an injunction would not substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Although the four factors "interrelate on a sliding scale and must be balanced against each other," *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998), if the moving party fails to make a showing of irreparable harm, "that alone is sufficient . . . to conclude that the district court did not abuse its discretion" in denying preliminary injunctive relief. *CityFed Fin. Corp. v. Office of Thrift*

Supervision, 58 F.2d 738, 747 (D.C. Cir. 1995))(holding, where the movant had "made no showing of irreparable injury," that the court "need not reach the district court's consideration of the remaining factors relevant to the issuance of a preliminary injunction"); *See also Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003) ("The *sine qua non* of granting any preliminary injunctive relief is a clear and convincing showing of irreparable injury to the plaintiff."). A moving party's failure to establish any likelihood of success on the merits, can be equally fatal. *See Katz v. Georgetown Univ.*, 246 F.3d 685, 688 (D.C. Cir. 2001) (finding that a preliminary injunction "never will be granted unless a claimant can demonstrate a 'fair ground for litigation'").

In this case, plaintiff's motion for a preliminary injunction "faces an additional hurdle because he seeks a mandatory injunction as opposed to a prohibitive injunction." *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 36 (D.D.C. 2000) (*citing Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969)). Because "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), where an injunction is mandatory and "would alter, rather than preserve, the status quo by commanding some positive act, . . . the moving party must meet a higher standard." *Veitch v. Danzig*, 135 F. Supp. 2d 32, 35 (D.D.C. 2001) (*citing Phillip v. Fairfield Univ.*, 118 F.3d 131, 133 (2d Cir. 1997)); *See also Dorfmann v.*

Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969)("The power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised.") (citation and quotation marks omitted).

IV. ARGUMENT

A. PLAINTIFF'S CLAIMS SEEK RELIEF FOUNDED ON A CONTRACT DISPUTE WITH THE GOVERNMENT AND JURISDICTION THEREFORE LIES EXCLUSIVELY IN THE COURT OF FEDERAL CLAIMS.

Federal courts have limited jurisdiction, and are only capable of reviewing cases through grants of power contained in either the Constitution or in an Act of Congress. *Kenosha v. Bruno*, 412 U.S. 507, 511 (1973). It is well-settled that the United States, as sovereign, "is immune from suit save as it consents to be sued, and the terms of consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). *See also United States v. Orleans*, 425 U.S. 807 (1976); *United States v. Testan*, 424 U.S. 392, 399 (1976) ("except as Congress has consented to a cause of action against the United States, 'there is no jurisdiction . . . to entertain suits against the United States'") (*quoting United States v. Sherwood*, 312 U.S. at 587-88). Plaintiff bears the burden of establishing that this Court has jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Since the gravamen of plaintiff's Complaint is a bid protest, the Court of Federal Claims (COFC) has sole jurisdiction over it.

1. Transfer to the Court of Federal Claims Pursuant to 28 U.S.C. § 1631 is Appropriate.

The Tucker Act, as amended by the Administrative Dispute Resolution Act (ADRA), 28 U.S.C. § 1491(b)(1) (2006), confers jurisdiction on The COFC:

> to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. 28 U.S.C. § 1491(b)(1).

The COFC reviews a bid protest action under the standards set out in the Administrative Procedure Act (APA), 5 U.S.C. § 706. 28 U.S.C. § 1491(b)(4); *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed.Cir.2004). The APA provides that an agency's decision is to be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Bannum, Inc. v. United States*, 404 F.3d 1346, 1351 (Fed.Cir.2005); *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1329 (Fed.Cir.2004); *Impresa Construzioni Geom. Domenico Garufi v. United States* , 238 F.3d 1324, 1332 (Fed.Cir.2001); *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057 (Fed.Cir.2000).

Moreover, 28 U.S.C. § 1631 provides that "[w]henever a civil action is filed in a court . . . and that court finds that there is want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action" to any other

such court in which the action could have been brought. The ADRA, 28 U.S.C. § 1491(b)(1), expressly states that the COFC shall have sole jurisdiction to render judgment on an action by an interested party objecting to the award of a contract or any alleged violation of statute or regulation in connection with a procurement.[1] In short, pursuant to the ADRA, the COFC has exclusive jurisdiction over all contract procurement cases, including cases involving disappointed bidders.

Plaintiff's claim falls squarely under the jurisdiction of the COFC. Plaintiff is a disappointed bidder objecting to any award of a "pending contract" it alludes to in its Complaint. Plaintiff is alleging violations of the terms of the solicitation and violations of the Federal Regulations. Compl. ¶¶ 36-40. This Court does not maintain jurisdiction over bid protests. Therefore, pursuant to 28 U.S.C. § 1631, it is in the interest of justice that this action be transferred to the COFC as the only federal court with jurisdiction over it.

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[1]The United States Court of Appeals for the Federal Circuit defines "interested party" in § 1491(b)(1) as "limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract [by the Government]." *Am. Fed'n of Gov't Emps. v.United States*, 258 F.3d 1294, 1302 (Fed.Cir.2001). This statutory definition imposes a two-part burden to establish standing: (1) plaintiff must be an actual or prospective bidder, and (2) plaintiff must possess a direct economic interest. *Rex Serv.Corp. v. United States*, 448 F.3d 1305, 1307 (Fed.Cir.2006). Within its Complaint plaintiff has readily conceded satisfaction of both prongs of the test. Compl. at ¶¶ 4, 6 and 20.

2. The ADRA, Its Sunset Provisions and Bid Solicitation Cases.

In 1996, Congress enacted the ADRA, which amended the Tucker Act to give the COFC jurisdiction to consider pre- and post-award protests. 28 U.S.C. § 1491(b)(1). *Novell, Inc. v. United States*, 46 Fed. Cl. 601, 605 (Fed. Cl. 2000); *Novell, Inc. v. United States*, 109 F. Supp. 2d 22 (D.D.C. 2000). Prior to the ADRA, the COFC had been limited to considering procurement challenges filed before a contract was awarded. *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1372 (Fed. Cir. 1983) (en banc). Prior to the ADRA, the federal district courts had enjoyed broader jurisdiction under the "*Scanwell* doctrine," which provided that the district courts could hear procurement challenges under the Administrative Procedure Act both before and after contract award. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861-73 (D.C. Cir. 1970). *See also Free Air Corp. v. FCC*, 130 F.3d 447, 450 (D.C. Cir. 1997); *Int'l Eng'g Co. v. Richardson*, 512 F.2d 573, 579 (D.C. Cir. 1979).

The ADRA provides:

> Both the Unties [sic] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of a statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether the suit is instituted before or after the contract is awarded.

28 U.S.C. §1491(b)(1). *See also Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001). This provision allowed both the federal district courts and the COFC to hear "the full range of cases previously subject to review in either system." *Id.* (*citing* 142 Cong. Rec. §11849 (daily ed., Sept. 30, 1996) (statement of Sen. Levin)).

The ADRA, however, also included a "Sunset Provision," which terminated federal district court jurisdiction over all procurement protests on January 1, 2001. Pub. L. No. 104-320, § 12(d), 110 Stat. at 3875 (codified in note to 28 U.S.C. § 1491). The purpose of the Sunset Provision was to "channel the entirety of judicial government contract procurement protest jurisdiction to the Court of Federal Claims." *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001). Senator Cohen, who offered the Sunset Provision, explained its purpose as follows:

> [The legislation] is designed to increase the efficiency of our procurement system by consolidating jurisdiction over bid protest claims in the Court of Federal Claims. The [legislation] would reverse the decision of the D.C. Circuit in *Scanwell* . . . . Providing district courts with the jurisdiction to hear bid protest claims has led to forum shopping and the fragmentation of [g]overnment contract law. Consolidation of jurisdiction in the Court of Federal Claims is necessary to develop a uniform national law on bid protest issues and end the wasteful practice of shopping for the most hospitable forum. Congress established the Claims Court – now the Court of Federal Claims – for the specific purpose of improving the areas of . . . [g]overnment contracts . . . . Scanwell jurisdiction frustrates this purpose and deprives litigants of the substantial experience and expertise the Court of Federal Claims has developed in the [g]overnment contracting area.

142 Cong. Rec. S6156 (daily ed. June 12, 1996) (statement of Sen. Cohen).

The Federal Circuit in *Emery* read the ADRA and its legislative history to mean that, beginning January 1, 2001, "the Court of Federal Claims is **the only judicial forum** to bring any government contract procurement protest." 264 F.3d at 1080 (emphasis added). *See also PGBA, LLC v. United States*, 389 F.3d 1219, 1227 (Fed. Cir. 2004) ("The legislative history indicates that, by giving the Court of Federal Claims exclusive jurisidiction . . . Congress intended to increase the uniformity of bid protest and government contract law."); *Novell, Inc. v. United States*, 109 F. Supp.2d 22, 24-25 (D.D.C. 2000) (cited with approval in Emery, 264 F.3d at 1080).[2] In a series of cases, judges in this district have not only concurred that the ADRA grants exclusive jurisdiction over bid protests to the COFC, but expressly held that ADRA jurisdiction is not limited in nature, but is very expansive. *See Advanced Sys. Tech., Inc. v. Barrito*, 2005 WL 3211394 (D.D.C., November 1, 2005) (ESH) (explaining ADRA and rejecting plaintiff's bid protest claims premised on the APA); *Labat-Anderson, Inc. v. United States*, 346 F. Supp. 2d 145, 152 (D.D.C. 2004) (JDB).

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[2] *C.f. Baltimore Gas and Electric Co. v. U.S.,* 290 F.3d 734, 737 (4th Cir. 2002), which was filed prior to the effective date of the Sunset Provision. The Court stated: "'Congress included the sunset provision (1) to address the problem of forum shopping among the district courts and the Court of Federal Claims and (2) to provide national uniformity in resolving [federal bid solicitation] disputes.' [Citing Senator Cohen, *supra,* in text.]. Congress has not acted to extend district court jurisdiction, and thus federal bid solicitation disputes may now be filed only with the Court of Federal Claims."

3.Plaintiff, a Disappointed Bidder, Expressly Asserts Breach of Statutes and Regulations in Connection with a Procurement.

Plaintiff's complaint is, at bottom, a bid protest. Plaintiff's complaint alleges various problems in connection with the solicitation for, and completion of, a "pending" government procurement. Moreover, the nature of the relief plaintiff seeks demonstrates that this lawsuit is a bid protest within the meaning of the ADRA. Therefore, this Court lacks jurisdiction over the Complaint.

First, plaintiff identifies a solicitation as giving rise to the lawsuit. Compl. at ¶¶ 2, 4. Plaintiff's Complaint describes the solicitation ("pending contract") and the circumstances surrounding the solicitation in detail and makes various allegations about its claim to that solicitation. Pl's. Compl. ¶¶ 18-20; 35-36. Plaintiff's complaint expressly challenges the DVA's handling of the bid solicitation, and in particular, its alleged breach of the terms of the Veterans Benefits, Health Care and Information Technology Act of 2006, Pub.L. No109-461, § 502 (2006) and the Federal Regulations implementing the Veteran Administration's Veteran's First Contracting Program. Compl. ¶¶ 1, 15, 35-37. Plaintiff asserts, *inter alia*, that DVA's action "grossly undermines the integrity of DVA's procurement process" and is not "contemplated by applicable procurement statute or regulation, or the operable laws concerning the Veterans First Contracting Program enacted in 2006" and is contrary to "

[Congressional intent] and the DVA's own regulations." Compl. ¶¶ 3, 36.[3] Second, plaintiff, consistent with being a disappointed bidder, protested the award to the "pending contract." Compl. at ¶ ¶ 4, 6, 20, 36.

Third, as relief, plaintiff asks the Court to set aside the award of the "pending contract" and set the conditions for an award of the "pending contract" to BCS. Compl., Prayer for Relief. In keeping with its requested relief, plaintiff explains in detail in the complaint why it believes DVA should have accepted its application to the Veteran's First Construction program and bid solicitation. Compl. at ¶¶ 18-34. There can be no question that plaintiff is a disappointed bidder seeking to overturn or enjoin the award of a contract: a bid protest over which this Court lacks jurisdiction.

As a bid protest, plaintiff's claim falls squarely within the ambit of the ADRA. 28 U.S.C. §1491(b) vests exclusive jurisdiction in the Court of Federal Claims to hear "an action by an interested party objecting to . . . any alleged violation of statute or regulation in connection with a procurement or proposed procurement." 28 U.S.C. §1491(b) (emphasis added). The complaint's very language demonstrates that plaintiff is challenging the DVA's procurement and the statutes and regulations governing that procurement. The Court should apply the plain text of the ADRA. As the Federal Circuit explained:

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[3] Plaintiff fails to specifically identify the sections of the federal regulations that the DVA allegedly violated.

> The language of §1491(b) . . . does not require an objection to the actual contract procurement, but only to the 'violation of a statute or regulation in connection with a procurement or proposed procurement.' The operative phrase 'in connection with' is very sweeping in scope. As long as the statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction.

Ramcor Services Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999). *See also Labat-Anderson v. United States*, 346 F. Supp.2d at 152.

Plaintiff's allegations and requested relief clearly have a "connection to a procurement."[4] The complaint alleges the DVA violated the terms of the Statute and the federal regulations and that the DVA's actions were arbitrary, capricious and not in accordance with law under the APA. Compl. ¶¶ 36-38. Plaintiff also alleges the DVA's conduct violated the requirements of the procurement process. Compl. ¶¶ 4, 36. Moreover, the relief that plaintiff seeks, overturning or enjoining of the award of a specific contract (the "pending contract"), is consistent with a bid protest claim rather than any alleged general violation of the APA. After all, plaintiff is not a party to the contract between the government and whomever the government intends to award the "pending contract".

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[4] The COFC has read the term "procurement" in the ADRA as denoting "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with the contract completion and close-out." *Labat-Anderson, Inc. v. U.S.,* 50 Fed. Cl. 99, 104 (Fed. Cl. 2001)(quoting definition provided in 41 U.S.C. §402(2) and 41 U.S.C. §2302(3)(A)).

As relief, plaintiff is seeking: 1) a declaratory judgment from this Court stating that the DVA final decision is contrary to law, arbitrary and capricious, unenforceable and otherwise unlawful and that Ms. Thompson is the sole owner and managing member of BCS. 2) preliminary injunctive relief enjoining the defendant Secretary of the United States of Veteran Affairs from awarding a "pending contract" that plaintiff maintains it would have been awarded but for the DVA's final decision 3) preliminary injunctive relief enjoining the defendant Secretary of the United States of Veteran Affairs from enforcing or implementing the DVA's final decision (with costs and attorney's fees against the defendant) and 4) that this Court vacate the DVA's final decision or in alternative remand the DVA's final decision to the agency for further proceedings. Compl., Prayer for Relief. Plaintiff's request for relief further reveals that its complaint is a bid protest.

First, 28 U.S.C. §1491(b) vests exclusive jurisdiction in the COFC over "any alleged violation of statute or regulation in connection with a procurement or proposed procurement." In determining whether plaintiff's complaint is asserting "any . . . violation of statute or regulation in connection with a procurement," the Court should be mindful that one of the fundamental requirements of statutory construction is that words in a statute must be given their ordinary or natural meaning. *Ardestani v. I.N.S.*, 502 U.S. 128, 135-36 (1991); *Sadhvani v. Chertoff*, 460 F.Supp.2d 114, 121 (D.D.C. 2006) (JDB). The

word "any" is a clear word of broad inclusion, meaning, "one or more indiscriminately from all those of a kind; any person or persons; . . . any thing or things; and part, quantity or number. . ." WEBSTER'S THIRD NEW WORLD DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1976). *See also Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 31 (2004) (interpreting a contract clause containing the word "any," finding that a natural reading of the word has an expansive meaning, "one or some indiscriminately of whatever kind," holding that there was no reason to contravene the clause's obvious meaning). "[W]here the words of a law, treaty, or contract, have an obvious meaning, all construction, in hostility with such meaning is excluded." Id.

Following the reasoning of the Supreme Court, plaintiff's attempted evasion of the ADRA's clearly defined jurisdiction over bid protests impermissibly attempts to reinterpret the statute and Congress' specific inclusion of the word "any" in the ADRA. The ADRA broadly locates jurisdiction over bid protests in the COFC. *See Labat-Anderson, 346 F.Supp. 2d at 151* and *Advanced Systems Technology, Inc. v. Barrito,* 2005 WL 3211394 at *3 *et seq*.

By apparently reading out of the statute the word "any," plaintiff violates an additional "cardinal principle of statutory construction," that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.*

v. Andrews, 534 U.S. 19, 31 (2001) (*citing Duncan v. Walker*, 533 U.S. 167 (2001). *See also United Am., Inc. v. N.B.C.-U.S.A. Hous., Inc. Twenty Seven*, 400 F. Supp. 2d. 59, 62 (D.D.C. 2005). It is clear, that the ADRA Sunset Provision, having taken effect in January 2001, precludes the federal district courts from hearing any cases relating to bid protests. The issues that plaintiff alleges in its complaint are violations of statutes and regulations in the context of a bid solicitation. In *Labat v. Anderson, supra*, and *Advanced Systems Technology, Inc. v. Barrito, supra*, Judges Bates and Huvelle held that the ADRA clearly ended APA jurisdiction over bid protests within the district courts and furthermore, that the ADRA created expansive COFC jurisdiction over procurement disputes. As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction to the COFC. *Barrito, supra*, at *5 (COFC jurisdiction over procurement issues is far more "expansive" than just bid protests).

Additionally, Judge Bates, in *Labat-Anderson*, read the term "procurement" to encompass all states of the procurement process from determining the government's needs to contract completion and closeout. *Labat*, 346 F.Supp.2d at 151. Clearly, judges in this District understand the legislative intent behind the ADRA and its Sunset provision: that forum shopping be eradicated; that consistent and uniform case law be produced;

and that all bid protest issues fall under the jurisdiction of the COFC.[5] To attempt to carve out "types" of bid protests, such as plaintiff is apparently attempting to do here, would result in the narrowing of the COFC's expansive jurisdiction over procurement matters, including bid protests, and is counter to the legislative intent behind the ADRA. It is clear on the face of plaintiff's complaint that it implicates alleged violations of procurement statutes and regulations in connection with a "proposed" procurement.

Moreover, since the passage of the ADRA in 1996, and continuing after the Sunset Provision became effective in 2001, the Court of Federal Claims has continued to adjudicate the full range of bid protest cases, including bid protests pertaining to awards of SDVOSB contracts subsequently issued to successful bidders. *See, e.g.,Angelica Textile Services, Inc.* v. U.S. 95 Fed.Cl. 208 (Fed.Cl. 2010) ; *CS-360, LLC v. U.S., 94 Fed.Cl. 488 (Fed.Cl.,2010); GCC Enterprises, Inc. v. U.S.* 91 Fed.Cl. 1 (Fed.Cl.,2009)*; Totolo/King Joint Venture v. U.S.* 87 Fed.Cl. 680 (Fed.Cl. 2009)*; DCMS-ISA, Inc. v. U.S.* 84 Fed.Cl. 501 (Fed. Cl. 2008). Accordingly exclusive jurisdiction is vested in the COFC.

II. EVEN IF THE COURT HAD JURISDICTION, PLAINTIFF WOULD NOT BE ENTITLED TO A PRELIMINARY INJUNCTION.

A. Plaintiff Are Not Likely to Succeed on the Merits.

[5] See comments by Senator Cohen, supra.

A plaintiff that cannot demonstrate a significant likelihood of success on the merits has no hope of obtaining a preliminary injunction. *See Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 182 n.2 (D.C. Cir. 2006); *Katz*, 246 F.3d at 688; *Apex, Inc. v. FDA*, 449 F.3d 1249, 1253-54 (D.C. Cir. 2006). "[A]bsent a 'substantial indication' of likelihood of success on the merits, 'there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review.'" *Biovail Corp. v. FDA*, 448 F. Supp. 2d 154, (D.D.C. 2006) (*quoting American Bankers Ass'n v. Nat'l Credit Union Admin.*, 38 F. Supp. 2d 114, 140 (D.D.C. 1999)). Plaintiff are unlikely to succeed on the merits for two reasons. First, they cannot prove that this Court has jurisdiction to review their claims. Second, the DVA reasonably determined that plaintiff's application for inclusion in the Veteran's First Construction program was fatally flawed due to the inability to establish actual control of the company by a service disabled veteran.

1. The Court Lacks Jurisdiction.

Plaintiff has no chance of success on the merits because their claims will not survive defendant's motion to dismiss. As discussed supra, plaintiff should have filed this action in the Court of Claims. Given that plaintiff cannot litigate (let alone prevail on) their claims in this Court, they cannot obtain a preliminary injunction. *See Tanner v. Federal Bureau of Prisons*, 433 F. Supp. 2d 117, 122 n.5 (D.D.C. 2006); *Power Mobility Coalition v. Leavitt*, 404 F. Supp.

2d 190, 205 (D.D.C. 2005) ("[T]he plaintiff is not likely to succeed on the merits because this Court is barred by statute from having subject matter jurisdiction in this case.").

2. DVA's Interpretation and Application of Its Regulations Was Not Arbitrary, Capricious, or Contrary to Law.

Even if this Court could review plaintiff's claims on the merits, plaintiff would be unable to satisfy the exceedingly high standard for having agency action declared arbitrary and capricious. "There is a presumption in favor of the validity of administrative action." *Bristol- Myers Squibb Co. v. Shalala*, 923 F. Supp. 212, 216 (D.D.C. 1996). Thus courts apply a deferential standard under which agency action may be disturbed only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action must be upheld if it is rational, based upon relevant factors, and within the agency's authority. *See Motor Vehicle Mfrs. Ass'n of the United Sates, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *See also AT&T Corp. v. FCC*, 349 F.3d 692, 698 (D.C. Cir. 2003).

Where, as here, plaintiff challenges an agency's interpretation of its own regulations, that standard requires courts to accord "substantial deference" to the agency's view. *National Wildlife Fed. v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997); *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). The agency's interpretation is "controlling unless plainly erroneous or inconsistent with the

regulation." *Auer*, 519 U.S. at 461 (internal quotations omitted); *See also Mistick PBT v. Chao*, 440 F.3d 503, 511 (D.C. Cir. 2006) (quoting same); *Browne*r, 127 F.3d at 1129 ("Provided the interpretation does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."). That is, courts must "defer to [the agency's] view unless an alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation." *Air Transport Ass'n of America v. FAA*, 291 F. 3d 49, 53 (D.C. Cir. 2002). The agency may present its interpretation of the relevant regulation in a legal brief. *See Auer*, 519 U.S. at 462; Drake, 291 F.3d at 68-69.

To prevail on the merits of their claims, plaintiff must show that DVA's determination that BCS was not a veteran controlled small business violated the plain language of the controlling regulations or statute, or was otherwise unlawful.[6] Plaintiff will be unable to make that showing. BCS must be deemed to be a veteran controlled small business prior to final award of a DVA VetBiz VIP contract. That is all the regulations required. Given the evidence amassed as a result of the application and on site review, it was not reasonable for DVA

[6]Plaintiff spends considerable time its motion attempting to establish its SDV ownership, by Ms. Thompson, even as it acknowledges that SDV ownership has not been challenged. Instead the "sole" bases for denying plaintiff's eligibility for inclusion in the VetBiz VIP database is SDV "control" of BCS. Compl. ¶ 35.

to conclude that BCS was in fact controlled by the SDV, Ms. Thompson in accordance with the requirements outlined in 38 CFR § 74.4. As the applicant, BCS bore the burden of establishing with adequate evidence their compliance with the verification program plan.

a. DVA Applied Its Regulations Properly In Determining That BSC Is Not An SDV controlled business.

The notice of denial issued to BCS contained the information contemplated by the DVA regulations necessary to make a determination. One or more service-disabled veterans must manage and control the daily business operations of an SDVOSB. 38 C.F.R. § 74.1. An SDV "controls" an SDVOSB if he or she conducts "both the long-term decision making and the day-to-day management and administration of the business operations."

As with the ownership requirements, control over an SDVOSB must be consistent with the legal form of the entity.38 C.F.R. § 74.4(a), (b) ("CVE regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations.").

When the SDVOSB is a partnership or a limited liability company, service-disabled veterans must be the general partners or managing members, respectively, with control over all of the entity's decisions. 38 C.F.R. § 74.4(d)-(e). For corporations, one or more service-disabled veterans must

control the board of directors. 38 C.F.R. § 74.4(f). Control over a board of directors occurs when one or more service-disabled veterans own at least 51% of all voting stock, are on the board of directors, and can overcome any super majority voting requirements that may exist. 38 C.F.R. § 74.4(f)(1)(ii).

To be capable of exercising control, a service-disabled veteran must hold the highest officer position in the concern and must possess sufficient managerial experience to run the business.[7] However, the service-disabled veteran does not need to have the technical expertise or required license(s) for the business, as long as the service-disabled veteran "has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise." Under the Veterans First Contracting program, non-veterans may be involved with the management of, and hold an ownership interest in, the SDVOSB, subject to certain restrictions and so long as the non-veteran does not control or have the power to control the SDVOSB.[8]

The regulations require that the DVA to look beyond the literal business ownership and titles and instead focus on how the SDVOSB is run on a daily basis.[9] In order to determine the actual control of the SDV, the DVA may review, among other things, the firm's tax returns and operating agreement or

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[7] 38 C.F.R. § 74.4(b), (c)(1), (2).

[8] 38 C.F.R. § 74.4(b).

[9] 38 C.F.R. § § 74.1; 74.4.

bylaws,[10] the SDV's resume, the location of the firm's SDVOSB contracts in relation to the location where the service-disabled veteran works and resides, and the level of the service-disabled veteran's involvement with the performance of his or her company's SDVOSB contracts.

Following a site examination of BCS's principal place of business, a review of plaintiff's application for VIP verification, and other documents submitted by plaintiff CVE found "numerous defects." DVA's Final Decision (plaintiff's exhibit A of Thompson Declaration) at 3.

1) BCS's organizing documentation does not list Ms. Thompson, the SDV, as the highest officer within BCS and contains internal contradictions

38 CFR § 74.4(c)(2) states that, "[a]n eligible full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in SDVOB." BCS's Operating Agreement does not list Ms. Thompson as the President of BCS. The plaintiff does not contest this. Pl's. Mot. at 20. In fact, the plaintiff does not contest that none of the official company documents submitted to CVE authenticated that Ms. Thompson held the office of President and CEO. Instead, plaintiff, without citing authority, attempts to shift the burden of production to the CVE by implying that it was CVE's burden to "suggest" or prove "some other individual" may be "serving as president and

[10]38 C.F.R. § 74.4 (permitting examination of the corporate structure of an SDVOSB to determine if the veteran possesses the requisite control).

CEO" of BCS. *Id.* Plaintiff's attempt to reverse this burden should fail.

It is the applicant's (BCS) burden to establish the requisite factors. 38 C.F.R. Part 74. 12 *(* "Each VetBiz VIP Verification applicant must submit the electronic forms and attachments CVE requires"). DVA's Final Decision clearly explained that the omission to substantiate the SDV as the highest ranking officer within the organizational documents was a serious violation of regulatory standards and contributed to BCS's preclusion from the Veteran First Contracting Program. DVA Final Decision letter at 3-4. [11] Instead of being an over technical reading of the regulations, as plaintiff suggests, the SDV's absence as highest ranking officer becomes quite conspicuous given the entire record laid bare before the CVE (explained more *infra*).

2) BCS's organizing documentation was unclear and impermissibly divests authority away from the SDV.

38 CFR § 74.20(b) provides the:

> "CVE may conduct the examination, or parts of the program examination, at one or all of the participant's offices. . . As a minimum, examiners shall review all documents supporting the application, as described in § 74.12. These include: Financial statements; Federal

[11] Contrary to plaintiff's allegations, the CVE did in fact consider that there were other indicia of Ms. Thompson being in the highest officer position. DVA's Final Decision Letter at 3. ("The documents(Amended and Restated Operating Agreement) appropriately designate Ms. Thompson, as the Managing Member, at Schedule A and section 5.7 granted the Managing Member authority to control the LLC.") However, plaintiff has provided no authority to state that some indicia of control requires the CVE to ignore other indicia of lack of control by Ms. Thompson. Indeed, as stated above, it is CVE's duty to determine the SDV's actual control.

> personal and business tax returns; personal history statements; and Request for Copy or Transcript of Tax Form (IRS Form 4506) for up to 3 years. Other documents, which may be reviewed include (if applicable): Articles of incorporation /Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records . . ."

BCS's organizing documents, 2005 Amended and Restated Operating Agreement sections 5.8 and 6.1 were properly found to be contradictory. Section 5.8 establishes the officer positions and states that the [non-managing] officers act on behalf of the Managing Member and at the Managing Member's discretion. However, section 6.1 goes on to state that "[n]on-Managing Members" cannot take part in the control of the concern. DVA's Final Decision Letter at 4. In essence, BCS's constitution allows [non-Managing] members hold officer positions but be unable to do anything to control BCS. *Id.* Plaintiff's position is that these are "issues of no relevance," Pl's. Mot. at 21. To contrary, the regulations specifically allow for examination of these records precisely because organizational documents are apart of the few tools CVE investigators have to parse the evidence of actual control by SDV. Nothing in plaintiff's motion demonstrates otherwise. Accordingly, the CVE's examination of the organizational records were reasonable and noting a potential conflict within the BCS organizational structure that could impact upon SDV control was reasonable.

The CVE also concluded that Article V within BCS's 2005 Amended and Restated Operating Agreement allowed for too much delegation of the

management responsibilities from the SDV to non-veterans. Final DVA Decision at 4. 38 CFR § 74.4 (e) provides that "in the case of a limited liability company, one or more veterans or service-disabled veterans must serve as management members, with control over all decisions of the limited liability company."

Plaintiff fails to directly engage this rationale in its motion. Specifically, plaintiff does not contest that the vast potential divestment of authority from the SDV within Article V of the 2005 Amended and Restated Operating Agreement is an indicia of lack of control by the SDV.[12] Instead plaintiff quotes 38 CFR § 74.4 (a) which generally provides for non-veteran involvement within a SDVOSB. This general axiom is not contested, but plaintiff's argument misses the mark. The CVE precluded BCS's participation in the Veteran First Contracting program due to, in part, too much delegation of authority from the SDV, not because there was some delegation of authority to a non-veteran.

The CVE notification of denial letter explained that BCS's contained impermissible super majority voting requirements that would allow non-

[12] For example, BCS's Article V (iv) of the 2005 Amended and Restated Operating Agreement (attached, excerpted Exhibit 1) provides that in the absence of the president/CEO or in the event of her "inability" or "refusal to act" the vice presidents "shall" exercise supervision over the BCS and have the same authority as the president/CEO, including the power and authority to sign all contract. Clearly, one reasonable interpretation of this provision is that if Ms. Thompson "refus[es] to act" the vice presidents can simply "act" on her behalf without her approval, essentially eviscerating the "control" Ms. Thompson claims to possess as the president/CEO SDV.

veterans to control by vote general business activities such as committing to contracts over $10,000. *Id.* at 3-4. Thus, under section 6.4.(i) of the 2005 Amended and Restated Operating Agreement, the SDV, Ms. Thompson cannot obligate BCS any construction contract over $10,000 without the approval of a super majority of non-veterans. DVA's Final Decision at 4. Once again , plaintiff fails to engage the argument. 38 CFR § 74.4 (f) specifically indicates that if there are super majority requirements within the organizing documents, the SDV should have the authority to override the decisions of the super majority of non-veterans. Plaintiff did not present any information to the CVE that could lead to the conclusion that the SDV could retain control of general company activities despite potential opposition of a super majority of non-veteran voting members. Accordingly, the CVE's determination that the super majority requirements within the BCS's organizing documents was an indication of lack of control by the SDV, Ms. Thompson, is reasonable and substantiated by credible evidence from BCS.

3) Ms. Thompson, the SDV had significantly less management and construction industry experience than her non-veteran vice presidents

The DVA's Final Decision, concluded that the SDV, Mr. Thompson, had significantly less of the requisite management experience necessary to manage and control the day to day operations of a construction company like BCS. at 5. 38 CFR § 74.4(c)(1) states that, "[a]n applicant or participant must be

controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities." Using the resumes of the two BCS non-veteran Vice Presidents, the CVE found that plaintiff's Operating Agreement potentially gave non veterans undue control of the company, in violation of 38 C.F.R. § 74.4(c)(1). DVA's Final Decision documented that non-veteran BCS officers (specifically Vice Presidents of BCS, Fred Perkins and Phillip Armstrong) possess significantly greater experience within the construction industry than the SDV, Ms. Thompson, and this situation made it "highly probable" that non-veterans would have significant influence on business decisions as well as the day-to-day operations of BSC. *Id.* [13] Plaintiff does not argue that the SDV has greater or equal experience to non-veteran Perkins or non-veteran Armstrong. Instead plaintiff argues that neither non-veteran Perkins nor non-veteran Armstrong has an "equity interest" or "a particular

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[13] For example a simple review of the respective resumes found that prior 2006, the year she became involved with BCS, Ms. Thompson's "only experience in the construction industry was serving as an Estimating Assistant on an interim basis for the purpose of "construction working overview." DVA's Final Decision at 4.

In contrast, by 2003, Mr. Perkins was a Vice President of Business Development for McTech Corporation where he provided Business Development and procurement, managed key professional personnel, and fostered key relationships with various Federal contractors around the country. Additionally, Mr. Armstrong has a MBA; Southern Illinois University, Edwardsville, IL and a Civil Engineering, Johns Hopkins University, Baltimore, MD and possessed extensive construction industry experience and Government contracting experience. He is also well attuned in contract dispute resolution and claims processing, internal corporate structure and all-phase management duties, and has contract plans and specs constructability review experience. *Id.*

critical license" which plaintiff claims is a "prerequisite" before the regulation could apply to BCS. Pls. Mot. at 21.

However, the regulation at issue,38 C.F.R. § 74.4(i) and cited in the DVA's Final Decision, explicitly states that the factors listed to indicate non-SDV control were "illustrative only and not all inclusive." The clear import of the regulation was to identify circumstances where non-veterans, like the BCS vice presidents, control or *"have the power to control."* 38 C.F.R. § 74.4(i). Thus, the CVE cited to the provision that was closest to the scenario that BCS presented. In this instance, based on the provided résumés, CVE reasonably concluded non-veteran vice presidents had enough of an experience advantage in the construction industry that it is an indicia of lack of SDV control and influence on business decisions as well as the day to day operations of BCS. DVA Final Decision at 5. Finally, plaintiff made no argument that the BCS's vice presidents do not provide "bonding support," which can implicate experience in the construction industry, as another indicia of lack of control by the SDV. 38 C.F.R. § 74.4(i)(2). Accordingly, the CVE properly utilized the record to reasonably conclude that the SDV's limited experience compared to BCS's vice presidents was an indicia of lack of SDV control of BCS.

4) The SDV lacks control of BCS because of BCS's dependence on a larger non-veteran owned construction company.

38 CFR § 74.4(i)(4) states that "when business relationships exist with non-veterans or entities which cause such dependence that the applicant or

participant cannot exercise independent business judgment without great economic risk" it is considered a non-control element. DVA's Final Decision itemized the indicia of undue reliance upon a non-veteran owned outside entity. at 6. Specifically, BCS and another non-veteran owned construction company, McTech Corporation, shared the same mailing addresses throughout the United States (via leasing agreements), shared employees, was co-owned by a Vice President of BCS.[14] Thus BCS was found to have such dependence upon the non-veteran owned entity, McTech that BCS could not exercise independent judgment without great economic risk. *See*, 38 C.F.R. § 74.4(i)(4). Plaintiff offers no argument concerning the 26 "shared" employees between McTech and BCS, Fred Perkins' dual service as an owner of McTech and BCS officer or the economic dependence BCS has with McTech. As a result, plaintiff does not contest the accuracy of the CVE's findings. Instead, plaintiff merely proclaims that because "the agreements were negotiated at arms-length and are based upon fair market value" that it does not constitute "impermissible undue influence" or "overdependence on a third party" and that the DVA erred when it concluded that those facts were an indicia of control by a third party. Pl's. Mot at 17.

Even if the leasing contracts and shared employee arrangements were

[14] Fred Perkins, Vice President of BCS and cousin of the SDV, Ms. Thompson, was also found by the CVE to have a ownership interest in the Mc Tech Corporation. *Id.* at 6.

negotiated at arms length, it still would be indicia of undue control because the economic dependence on McTech is too great to conclude tht BCS could make an independent business judgment. Indeed, it is difficult to imagine how two "independent" companies could be more intertwined. Because, the CVE presented its factual basis for its conclusion that the business relationship between BCS and McTech could reasonably impact BCS's independent business decision, the CVE reasonably concluded that it was an indicia of control by a third party. Accordingly the facts supported the decision to preclude BCS's participation in the Veteran's First Construction Program.

B. Plaintiff Will Suffer No Irreparable Harm Absent An Injunction.

No injunction may issue in the absence of an "irreparable injury," no matter how strongly the other factors support the movant. *See CityFed Fin. Corp.*, 58 F.3d at 747; *Farris v. Rice, 453 F. Supp. 2d 76, 78 (D.D.C. 2006).* The moving party bears the burden of establishing that, absent an injunction, it will suffer an injury that is "both certain and great," and that "there is a clear and present need for equitable relief to prevent irreparable harm." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). As the D.C. Circuit has recognized:

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.

Chaplaincy of Full Gospel Churches, 454 F.3d at 298 (internal quotations omitted).

Purely economic loss, even when large sums of money are involved, typically will not constitute irreparable injury. *See Wisconsin Gas Co.*, 758 F.2d at 674 (noting it is "well settled that economic loss does not in and of itself constitute irreparable harm"); *Emily's List v. Federal Election Comm'n*, 362 F. Supp. 2d 43, 52 (D.D.C. 2005). Economic loss that threatens the survival of the movant's business may constitute irreparable harm. However, the movant may not rely on "bare allegations" that the business will not survive absent a preliminary injunction. *Wisconsin Gas Co.*, 758 F.2 at 674. Instead, the movant must substantiate its allegation of harm by showing that this threat to the business's viability is "certain to occur in the near future as a direct result of the threatened action." *Power Mobility Coalition v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005); *See also Wisconsin Gas Co.*, 758 F.2d at 674.

Plaintiff has not shown that they will suffer an "irreparable" injury absent a preliminary injunction. Plaintiff contend that DVA's decision to preclude BCS from participation in the Veteran First Construction program irreparably harms them because it will deprive them of significant revenues from a "pending contract" and their other government contracts. *See* Pl's. Mem. at 2. While that financial loss may harm plaintiff, it is neither certain nor irreparable. Instead, it is a purely financial injury, which plaintiff can be

ameliorated or avoided all together by correcting the deficiencies listed in the DVA's Final Decision letter and bid for another DVA contract under the Veteran's First Construction Program.

Because the loss plaintiff has identified is purely financial, it cannot support a finding of irreparable harm unless plaintiff establishes that these losses will threaten the continued existence of their businesses. Plaintiff has offered only extremely vague allegations that preclusion from the Veteran First Construction program would "adversely affect BCS's ability to grow its business and further develop its exercise in the construction industry." *See* Decl. of Shawnte' Thompson, ¶¶19 (Dkt. Entry 3). Plaintiff has not submitted audited financial statements or other detailed materials to demonstrate the impact this preclusion would have on their viability, and the dollar amount at which the preclusion would allegedly drive them out of business.

These "bare allegations" that the preclusion from the Veteran First Construction program somehow threatens the existence of plaintiff's business are insufficient to support a finding of irreparable harm. *See Wisconsin Gas Co.*, 758 F.2d at 654. Further, even if plaintiff had proven that the continued preclusion would drive them out of business, they cannot establish that this risk is "certain." The preclusion from this one veteran set aside program is but one of a myriad of construction contracts performed by the government or the private sector. Plaintiff has no argument that it is unable to bid on any other

contract or solicitation. Thus it is far from certain that the continued preclusion, which, in theory, plaintiff has the ability to end, will result in the loss of a dollar amount so high that it would drive plaintiff out of business. These factors weigh strongly against finding irreparable harm. *See Sociedad Anonima Vina Santa Rita v. United States Dep't of Treasury*, 193 F. Supp. 2d 6, (D.D.C. 2001) (concluding harm was not "certain" to occur and was not irreparable because plaintiff could petition the agency to change its decision and thereby avert the anticipated harm).

Finally, it bears noting that plaintiff also may file a request for reconsideration with the DVA. *See* 38 C.F.R. § 74.14. If that request is successful, plaintiff would be returned to the VetBiz VIP database and the Veteran's First Contracting program. There is no record of plaintiff attempting to request reconsideration from the DVA.

C. Suspending DVA's Ability to Enforce its Final Decision and to Preclude BCS from the Veteran's First Contracting Program Would Cause Harm to Third Parties and Would Be Contrary To the Public Interest.

The remaining two elements of the preliminary injunction analysis also favor denial of plaintiff's motion. Those factors require the Court to evaluate the harms others would suffer if the injunction were granted, and to determine whether injunctive relief would promote the public interest. *See Chaplaincy of Full Gospel Churches*, 454 F.3d at 297; *Serono Labs., Inc.*, 158 F.3d at 1318. The potential harm to third parties and the public interest both outweigh the

harms plaintiff claim they will suffer absent an injunction.

Granting plaintiff's injunction would undermine the public interest in the integrity of government set-aside contracts, and specifically would hamper DVA's ability to ensure that SDV's are in actual control of the SDVOSB's. The Veterans First Program was enacted with a focus on increasing contracting opportunities by the DVA for service-disabled veteran and veteran-owned qualified small businesses.

If the CVE cannot reasonably draw conclusions from all the indicia provided concerning who within a SDVOSB has both the actual control and the power to control that business's day-to-day operations it would severely undermine the DVA's and the public goals to provide service disabled veterans an opportunity to compete within the construction industry. In sum, plaintiff has alleged purely financial harm, cloaked as an alleged procedural deprivation. Hence DVA's Final Decision to preclude it from participating in a SDVOSB program was correct. Thus, all factors weigh decisively against the granting of a preliminary injunction.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court GRANT Defendant's motion to dismiss, and DENY plaintiff motion for a preliminary injunction or in the alternative TRANSFER this matter to the Court of Federal Claims.

Respectfully Submitted,

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